

Nos. 17-56438

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NORTH COUNTY COMMUNICATIONS CORPORATION,

Appellant,

v.

SPRINT COMMUNICATIONS COMPANY, L.P.,

Appellee.

Appeal from the United States District Court for the
Southern District of California
(Case No. 3:09-cv-02685-CAB-JLB)

**OPENING BRIEF OF APPELLANT NORTH COUNTY
COMMUNICATIONS CORPORATION**

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February 1, 2018

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Counsel for Appellant/Cross-Appellee North County Communications Corporation certifies the following:

North County Communications Corporation (“NCC”) is a privately owned corporation incorporated in the State of California with its corporate headquarters and principal place of business in San Diego, California. NCC has no parent corporation. No publicly held company owns ten percent (10%) or more of the stock of NCC.

The general nature and purpose of NCC is to provide local exchange telecommunications and other telecommunications services. NCC is certified as a competitive local exchange carrier (“CLEC”) by, among other state regulatory agencies, the California Public Utilities Commission (“CPUC”), the Arizona Corporation Commission (“ACC”), the Illinois Commerce Commission (“ICC”), and the Public Utility Commission of Oregon (“OPUC”). NCC provides local exchange services and is subject to the jurisdiction of the CPUC, ACC, ICC, OPUC and Federal Communications Commission.

Respectfully submitted,

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STATEMENT OF JURISDICTION

The district court order at issue in this appeal addressed the Phase 2 claims (*i.e.*, non-contract-based claims) of Appellant North County Communications Corporation (“NCC”) against Appellee Sprint Communications Company, L.P. (“Sprint”) following a bench trial of the parties’ Phase 1 claims (*i.e.*, contract-based claims, counterclaims, and defenses). [EOR 41-43.]

Following the Phase 1 bench trial, NCC appealed the district court’s decision. On May 26, 2016, this Court affirmed in part and reversed in part that decision. [EOR 33-37]. Following this Court’s decision, and prior to the district court’s order entering judgment in favor of Sprint, NCC requested that the district court stay entry of judgment in Phase 1 until the completion of Phase 2. [EOR 38-40.] On August 28, 2017, the district court issued its final order, denying NCC’s request, stating that no such bifurcation existed, finding all claims dismissed, and closing the case. [EOR 41-43.]

Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction of appeals of the district court’s final decision issued on August 28, 2017. NCC filed a timely Notice of Appeal on September 21, 2017. [EOR 1-2.]

STATEMENT OF ISSUES

Whether the district court incorrectly concluded that the case was not bifurcated, that all claims are dismissed, and that the case is closed.

STATEMENT OF THE CASE AND FACTS

On November 30, 2009, NCC filed a complaint against Sprint, asserting contract-based and non-contract-based (*e.g.*, quantum meruit and unjust enrichment) claims regarding Sprint's failure to pay NCC for terminating Sprint's telecommunications traffic. [EOR 47.]. Sprint answered and filed a counterclaim for breach of contract and other causes of action. [EOR 48.]. The operative complaint, NCC's Second Amended Complaint, was filed on July 22, 2011. [EOR 3-5.]

Following the district court's referral of certain questions to the Federal Communications Commission ("FCC"), the parties' remaining claims consisted of the following: (1) contract-based claims, counterclaims, and defenses, and (2) non-contract-based claims, counterclaims, and defenses. Sprint, however, argued that the FCC had primary jurisdiction to determine certain rights and obligations of the parties under the contract and that such determinations would be germane to issues of contract interpretation, and in May 2013, the district court stayed the litigation to allow Sprint to present its contract-related questions to the FCC [EOR 61]; however, over a year later, Sprint had not filed any complaint or request with the FCC for determination of the referral questions related to the contract.

NCC filed a motion to bifurcate [EOR 19-24], and on June 18, 2014, the district court granted NCC's motion to bifurcate the case into two phases: (1)

contract-based claims, counterclaims, and defenses; and (2) all other claims. [EOR 25-26.] Accordingly, the parties' contract-based claims, counterclaims, and contract-related defenses proceeded to a bench trial before the district court on August 3, 2015. [EOR 27-32.]

Following the bench trial, the district court issued its Findings of Fact and Conclusions of Law on September 11, 2015. On September 28, 2015, the district court issued its Judgment in the matter, finding in favor of Sprint. NCC appealed that decision on October 28, 2015. This Court affirmed the district court's decision in part and reversed it in part on May 26, 2017. [EOR 33-37.]

NCC requested that the district court stay entry of judgment in Phase 1 until the completion of Phase 2. [EOR 38-40.] On August 28, 2017, the district court issued its final order, denying NCC's request, stating that no such bifurcation existed, finding all claims dismissed, and closing the case. [EOR 41-43.]

SUMMARY OF ARGUMENT

The district court erred in determining that the case was not bifurcated, that NCC's non-contract-based claims are dismissed, and that the case is closed. Such conclusions clearly contradict the district court's multiple, previous rulings that bifurcated the case into two phases: (1) Phase 1 to address the parties' contract-based claims, counterclaims, and defenses; and (2) Phase 2 to address non-contract-based claims.

ARGUMENT

I. STANDARD OF REVIEW

Findings of fact are reviewed for clear error. *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002), *aff'd* 540 U.S. 644 (2004). Conclusions of law are reviewed de novo. *Id.* at 835. Mixed questions of law and fact are reviewed de novo. *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000).

The district court's decision regarding the status of the case and claims is a mixed question of law and fact, and thus, reviewed de novo. *Tyler v. Cuomo*, 236 F.3d 1124, 1134 (9th Cir. 2000); *Conrad v. Ace Property & Cas. Ins. Co.*, 532 F.3d 1000, 1004 (9th Cir. 2008); *Lamantia v. Voluntary Plan Administrators, Inc.*, 401 F.3d 1114, 1118 (9th Cir. 2005); *United States v. 1.377 Acres of Land*, 352 F.3d 1259, 1264 (9th Cir. 2003).

II. THE DISTRICT COURT INCORRECTLY DETERMINED THAT THE CASE WAS NOT BIFURCATED, THAT ALL CLAIMS ARE DISMISSED, AND THAT THE CASE IS CLOSED

In its Second Amended Complaint, NCC asserted common law, non-contract-based causes of action against Sprint related to Sprint's nonpayment for the services provided by NCC. [EOR 3-5.] Specifically, NCC alleged causes of action for quantum meruit and unjust enrichment. [*Id.*]. On September 27, 2012, the district court dismissed NCC's claim to recover against Sprint under tariff and its claim against Sprint for tortious interference with prospective business

advantage. [EOR 9-18.] The district court, however, did not dismiss NCC's common law, equitable claims for unjust enrichment and quantum meruit.

Following Sprint's failure to file a complaint or request with the FCC to address contract-related issues, NCC filed a motion to bifurcate the trial into two phases: (1) the parties' contract-based claims, counterclaims, and defenses; and (2) all other claims, including, but not limited to, non-contract claims and claims concerning implied contract. [EOR 19-24]. The district court granted NCC's bifurcation request on June 18, 2014: "[T]he court grants plaintiff's motion to bifurcate this action and to partially lift the stay...The court therefore lifts the stay as to plaintiff's contract-based claims and defendant's related counterclaims." [EOR 25-26.]

The district court's bifurcation of the case into contract-related and non-contract claims was reiterated in the district court's July 24, 2015 Pretrial Order, noting that, "[p]ursuant to the bifurcation order, the parties are now proceeding to trial on their contract-based claims and counterclaims." [EOR 28.] The Pretrial Order further emphasized the existing bifurcation by closing with the pronouncement that "[t]he trial of this case will be bifurcated in accordance with the Court's Order granting NCC's motion to bifurcate and lift the stay as to the parties' contract-based claims, counterclaims and defenses." [EOR 32.]

When Phase 1 of the bifurcated trial ended, those issues were ultimately decided and, following the related appeals, dismissed. To that end, NCC appealed the result of Phase 1, which order clearly presented a final order disposing of all of the parties' contract-based claims, counterclaims, and defenses. However, the district court clearly forgot about its bifurcation order and its many other orders referring to bifurcation. Indeed, when NCC sought to stay enforcement of the judgment from the Phase 1 result pending completion of Phase 2 [EOR 38-40], the district court, in denying that stay, stated that there had never been a bifurcation: "Had there been a bifurcation with remaining claims to be resolved notwithstanding the bench trial, the judgment would not have been final." [EOR 43.]

The district court's recent order clearly contradicts its previous orders and leaves NCC without a remedy for its damages or even an opportunity to try those matters. To avoid such an unjust result, this Court must reverse the recent finding that cuts against the district court's previous determinations.

If the district court's incorrect determination is allowed to stand, then NCC will have been forced by the district court to provide services to Sprint without any compensation. Such a result constitutes a judicial takings. *See, e.g., Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Haw. 1977), *aff'd in part and vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986).

Indeed, during the litigation, NCC sought an injunction to prevent Sprint from continuing to use NCC's call termination services; however, the district court denied that request for injunctive relief and, instead, required NCC to continue to route Sprint's calls without compensation. [EOR 15-18.]. In denying NCC's requested injunction, the district court found that NCC's harm could be fully remedied during litigation. [EOR 17.]. By refusing to proceed with Phase 2 of the bifurcated proceeding, the district court now precludes NCC from any remedy for the harm it suffered.

Finally, the district court should have stayed the enforcement of the judgment related to Phase 1 of this matter pending the resolution of Phase 2 under the bifurcation order. Allowing Sprint to enforce its Phase 1 judgment is likely to bankrupt NCC prior to the conclusion of Phase 2.

CONCLUSION

For the foregoing reasons, NCC respectfully requests that the Court grant NCC's appeal and reverse the district court's decision that the case was not bifurcated into contract-based and non-contract-based claims, that all claims are dismissed, and that the case is now closed. In addition, NCC respectfully requests that the Court direct the district court to stay enforcement of the Phase 1 judgment pending the outcome of Phase 2.

STATEMENT OF RELATED CASES

NCC previously appealed the district court's order and judgment regarding NCC's contract-based claims in Case No. 3:09-cv-02685-CAB-JLB (9th Cir. Case No. 15-56678). In addition, Sprint appealed the same order and judgment (9th Cir. Case No. 15-56722). This Court issued its Memorandum Decision on those two appeals on May 26, 2017. [EOR 33-37.]

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify the following:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,122 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

Dated: February 1, 2018

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Corporation

9th Circuit Case Number(s)

17-56438

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